MISSISSIPPI COURT OF APPEALS
NO. 2015-CA-00107-COA

NATHAN SINKO **APPELLANT**

VS.

STATE OF MISSISSIPPI **APPELLEE**

APPEAL FROM THE CIRCUIT COURT OF OKTIBBEHA COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Nathan Sinko, Appellant;

2. Jim Waide, Attorney for Appellant;

3. Waide & Associates, P.A., Attorneys for Appellant;

4. Honey H. Ussery, Attorney for Appellant;

5 State of Mississippi, Appellee;

6. John Robertson Henry, Jr., Attorney for Appellee;

7. Jim Hood, Attorney for Appellee; and

8. Office of the Attorney General, Attorneys for Appellee.

THIS, the 2nd day of June, 2015.

/s/ Jim Waide
JIM WAIDE

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3. Whether making eligibility for parole depend solely upon the date of conviction and sentence violates the Equal Protection Clause of the United States Constitution Amendment Fourteen.

4. Whether the United States Constitution's Fourteenth Amendment right to due process is violated by an *ex post facto* change in the Mississippi Department of Corrections' policy, under which prisoners are rendered ineligible for parole because of a change in policy occurring after the dates of their convictions and sentences.

5. Whether or not the Fourteenth Amendment Due Process Clause requires one to be warned that he is ineligible for parole, if the offense for which he is pleading guilty is one for which he is ineligible for parole.

STATEMENT OF THE CASE

This case arises from a change in the parole policies of the Mississippi Department of Corrections ("MDOC"), made four (4) years after Appellant Nathan Sinko's ("Sinko") crime, and approximately three (3) years after his guilty plea and sentence. The change in parole policies resulted in Sinko's not being released on parole, despite the fact that MDOC had repeatedly told him he was eligible and the Parole Board had decided to release him.

In July 2011, the Grand Jury of Oktibbeha County, Mississippi indicted Sinko, alleging:

> Count 1: "Manufacture [of] a controlled substance, to-wit: Methamphetamine, in violation of MCA §41-29-139."
>
> Count 2: "Possess[ion] [of] a controlled substance, to-wit: Methamphetamine, in an amount greater than 30g."
>
> Count 3: "Generat[ing] waste by . . . processing, or cooking together two or more precursor chemicals. . . ."

R:62-63.

The offenses all occurred on March 18, 2011. *Id.* More than one year after his indictment, following his completion of a drug rehabilitation program, and on May 2-3, 2012, Sinko entered an open guilty plea to Counts 1 and 2 of the Indictment. R:30-31.

The factual basis of the plea - as stated by the district attorney - was that Sinko's father-in-law reported to law enforcement that Sinko was operating a Meth lab at his residence. Deputies also searched Sinko's premises, located the Meth lab, and took possession of an amount of Methamphetamine. R:34-35.

Sinko entered an "open" guilty plea to Counts 1 and 2. The circuit judge warned Sinko of the maximum penalties. R:33. The circuit judge never told Sinko that he was ineligible for parole.

Id. This was understandable, since at that time MDOC maintained a policy that persons convicted of manufacture or sale of controlled substances under MISS. CODE ANN. § 41-29-139(a) were parole eligible. The circuit judge then sentenced Sinko to twelve (12) years on Count 1 (manufacture of Methamphetamine) and a concurrent sentence on Count 2 (possession of more than 30g of Methamphetamine).[1] R:50.

On November 13, 2014, Sinko filed a Petition for Post-Conviction Relief, alleging that he had repeatedly been promised parole by MDOC, and had actually had a parole date set, which had been subsequently revoked. R:5-6.

On December 8, 2014, Circuit Judge Lee J. Howard ruled that Sinko, "has failed to establish any claim which would warrant relief under Mississippi Code Annotated § 99-39-5," and "dismissed [the petition] without the necessity of a hearing." R:22.

Judge Howard's refusal to grant a hearing on Sinko's petition left intact Sinko's twelve (12) year sentence for manufacturing Methamphetamine, which, due to the *ex post facto* change in MDOC parole policies, must be served without parole.

It is undisputed that the MDOC parole policy at the time of Sinko's criminal act and sentence was to grant parole eligibility to those convicted of distribution or manufacture of Methamphetamine. This fact cannot be disputed, since MDOC immediately gave Sinko a parole eligibility date of May 3, 2015. R:14. Because of Sinko's good behavior, MDOC reduced that parole eligibility date to March 24, 2015. R:15. Because of Sinko's further good behavior, on

[1]Additional punishments were given for manufacturing Amphetamine under Count 1, but they are not relevant here. *See* R:50. Sinko also received a concurrent sentence on Count 2 - the possession charge. That is also not relevant, since there is no contention that possession of any drug makes one ineligible for parole. Similarly, Count 3 is not relevant, since Sinko was not convicted under that Count.

February 13, 2014, MDOC again reduced his parole eligibility date to September 24, 2014. R:17. Finally, MDOC reduced the parole date to September 22, 2014. R:19.

On July 8, 2014, the Mississippi Parole Board issued Sinko a formal notice that he was granted parole, subject to certain administrative measures, such as furnishing a proof of address where he would live. R:20.

After the Board issued Sinko the formal document notifying him that he was granted parole, MDOC notified Sinko that he was no longer eligible for parole and that his parole was revoked. R:6. MDOC explained that there had been a "change in the law in July 2014." *Id.* Upon Sinko's pointing out that others with the same charges had been released on parole, MDOC admitted that it had "misinterpreted the law," and had now established a "cutoff date," under which it would no longer parole prisoners who had been convicted of manufacturing or selling controlled substances between June 30, 1995 and July 1, 2014. R:6. By that time, MDOC had paroled thousands of prisoners, who, like Sinko, had been convicted of sale or manufacture of controlled substances between those dates.[2]

SUMMARY OF THE ARGUMENT

The circuit court erred in its belief that the post-conviction relief petition does not "establish any claim which would warrant relief under Mississippi Code Annotated § 99-39-5." R:22. In fact, Mississippi's Post-Conviction Collateral Relief Act specifically provides that one may obtain relief if it be shown that his "parole or conditional release [was] unlawfully revoked." MISS. CODE ANN. § 99-39-5(1)(h).

[2]The exact numbers are not currently in the record. Sinko, however, intends to file a motion requesting the Court to take judicial notice of MDOC's records, which will demonstrate the large number of prisoners released, as well as the prisoners who, like Sinko, were granted parole only to have it revoked.

Although MDOC is correct that there was a "change in the law in July 2014" that affected Sinko's parole eligibility, R:6, that change was intended to authorized MDOC to *continue issuing parole eligibility dates* to people, like Sinko, who were convicted of lower-level commercial drug offenses between June 30, 1995 and July 1, 2014, thereby "overruling" a 2011 decision by this Court. Pursuant to the plain language of MISS. CODE ANN. § 47-7-3(1)(f) and 41-29-139(b), as amended by the Legislature in 2014, Sinko is eligible for parole. Moreover, the legislative history of the amendments to the statutes demonstrates that they were enacted precisely because the Legislature determined that it was bad public policy to deny parole to persons convicted of minor commercial drug offenses, such as Sinko.

Numerous constitutional provisions are also being violated by Sinko's continued incarceration. First, releasing thousands of inmates in Sinko's identical situation, simply because their parole eligibility date came before an arbitrarily selected "cutoff date" by MDOC violates basic principles of equal protection of the law guaranteed by the Fourteenth Amendment of the United States Constitution. MDOC's allowing thousands of persons convicted of manufacture or sale of controlled substances to be paroled, and then refusing to release many others, simply because their parole date came after an arbitrarily selected "cutoff" point, is an arbitrary governmental action violating the equal protection clause.

Furthermore, since it was clear the MDOC's policy to allow persons convicted of possession or sale paroled at the time Sinko committed his criminal act, and at the time he was sentenced, MDOC's actions constitute an *ex post facto* law. This clause has been applied in closely analogous situations, most recently in *Price v. Warden*, 2015 WL 2208422 (5th Cir. 2015).

Under any reasonable definition of the term "consequence of the plea," being rendered ineligible for parole is an important consequence of a guilty plea. There is a vast difference between a sentence of twelve (12) years to serve, and a sentence under which one might be paroled after serving one-third (1/3) of that time. This Court should overrule its 5-4 decision in *Ware v. State of Mississippi*, 379 So.2d 904 (Miss. 1980), and hold that being warned of the ineligibility for parole is a "consequence" of a guilty plea.

ARGUMENT I.

SINKO UTILIZED THE CORRECT PROCEDURE.

The circuit court's denial of an evidentiary hearing rests, at least in part, upon its finding that Sinko "has failed to establish any claim which would warrant relief under Mississippi Code Annotated § 99-39-5." R:22. This is a misreading of Mississippi's post-conviction statute. According to *Horton v. King*, 148 So.3d 683, 686 (Miss. App. 2014), "[Petitioner's] claims related to his parole . . . "may be asserted under Mississippi Post-Conviction Collateral Relief Act." As stated in *McGovern v. MDOC*, 89 So.3d 69, 71 (Miss. App. 2011) (citations ommitted), "[A]n inmate may . . . challenge his parole eligibility as an original action in a circuit court." As stated in *Lattimore v. Sparkman*, 858 So.2d 936, 938 (Miss. App. 2003), "[A]n inmate may contest matters such as this as an original action in circuit court." The Mississippi Uniform Post-Conviction Collateral Relief Act, MISS. CODE ANN. § 99-39-1, *et seq*., plainly provides that one ground for relief is that a defendant's "parole or conditional release [was] unlawfully revoked." MISS. CODE ANN. § 99-39-5(1)(h). The circuit court committed plain error in its finding that it has no authority to entertain this Petition.

ARGUMENT II.

THE LEGISLATIVE INTENT IS THAT OFFENDERS CONVICTED OF SELLING OR MANUFACTURING CONTROLLED SUBSTANCES BETWEEN JUNE 1995 AND JULY 1, 2014, ARE ENTITLED TO PAROLE.

Ironically, the MDOC's decision to rescind its former parole policies and establish a "cutoff date," after which inmates who were convicted between June 30, 1995 and July 1, 2014 of the sale or manufacture of controlled substances would no longer be eligible for parole, came almost immediately after the Legislature enacted legislation authorizing MDOC to *continue* its policy of issuing parole eligibility dates to lower-level commercial drug offenders. In 2014, the Mississippi Legislature enacted comprehensive legislation amending the criminal laws, essentially providing greater time of incarceration for certain violent crimes, but providing lesser time of incarceration for non-violent crimes, including sale or manufacture of controlled substances. These amendments are the result of a report by the Corrections and Criminal Task Force, which was "charged with developing policies that improve public safety, ensure clarity in sentencing, and control corrections costs." Mississippi Corrections and Criminal Justice Task Force, *Final Report*, 3 (Dec. 2013). *See* Appendix. This Task Force "developed a comprehensive package of policy recommendations" to the Legislature that were projected to "halt all projected prison growth and avert at least $266 million in corrections spending through 2024." Final Report at 3. The Task Force recommended that the State "[c]ontrol corrections costs by focusing prison space on violent, career criminals[.]" *Id.* at 6. To this end, the Task Force recommended that the Legislature "[e]nsure nonviolent offenders are parole eligible." *Id.* at 16.

The Task Force, whose recommendation the Legislature ultimately accepted, specifically took note that "recent court rulings have identified a lack of clarity in the parole statute, ***rendering***

some commercial drug offenders ineligible for technical reasons." Final Report at 16 (emphasis added). Undoubtedly, this sentence referred, at least in part, to this Court's 2011 decisions in *McGovern v. MDOC*, 89 So.3d 69 (Miss. App. 2011). It was because of these so-called "technical decisions" - denying parole to persons convicted of the sale or manufacture of controlled substances other than marijuana "for technical reasons" - that the Task Force recommended "[c]larifying that lower-level commercial drug offenses are nonviolent for the purpose of parole consideration and thereby permitting MDOC *to continue issuing parole hearing dates to these offenders*, ..." Final Report at 16 (emphasis added).

Specifically, with regard to Sinko, the Legislature provided in MISS. CODE ANN. § 47-7-3(1):

> (f) No person shall be eligible for parole who is convicted or whose suspended sentence is revoked after June 30, 1995, except that an offender convicted of only nonviolent crimes after June 30, 1995, may be eligible for parole if the offender meets the requirements in subsection (1) and this paragraph. In addition to other requirements, if an offender is convicted of a drug or driving under the influence felony, the offender must complete a drug and alcohol rehabilitation program prior to parole or the offender may be required to complete a post-release drug and alcohol program as a condition of parole. For purposes of this paragraph, "nonviolent crime" means a felony other than homicide, robbery, manslaughter, sex crimes, arson, burglary of an occupied dwelling, aggravated assault, kidnapping, felonious abuse of vulnerable adults, felonies with enhanced penalties, the sale or manufacture of a controlled substance under the Uniform Controlled Substances Law, felony child abuse, or exploitation or any crime under Section 97-5-33 or Section 97-5-39(2) or 97-5-39(1)(b), 97-5-39(1)(c) or a violation of Section 63-11-30(5). An offender convicted of a violation under Section 41-29-139(a), not exceeding the amounts specified under Section 41-29-139(b), may be eligible for parole. In addition, an offender incarcerated for committing the crime of possession of a controlled substance under the Uniform Controlled Substances Law after July 1, 1995, shall be eligible for parole. This paragraph (f) shall not apply to persons convicted on or after July 1, 2014.
>
> (g)(i) No person who, on or after July 1, 2014, is convicted of a crime of violence pursuant to Section 97-3-2, a sex crime or an offense that specifically prohibits parole release, shall be eligible for parole. All persons convicted of any other offense

> on or after July 1, 2014, are eligible for parole after they have served one-fourth (1/4) of the sentence or sentences imposed by the trial court.[3]

MISS. CODE ANN. § 47-7-3(1)(f) & (g) (rev. 2014) (emphasis added).

The Legislature also *expanded* the "amounts" of "controlled substances" that are "specified under Section 41-29-139(b)." For example, Section 41-29-139(b)(1) now reads:

> (b) Except as otherwise provided in Section 41-29-142, any person who violates subsection (a) of this section in the following amounts shall be, if convicted, sentenced as follows:
>
> (1) *In the case of controlled substances classified in Schedule I or II, as set out in Sections 41-29-113 and 41-29-115* . . . such person may, upon conviction for an amount of the controlled substance of:
>
> (A) Less than two (2) grams or ten (10) dosage units, be imprisoned for not more than eight (8) years or fined not more than Fifty Thousand Dollars ($50,000.00), or both.
>
> (B) Two (2) grams or ten (10) dosage units or more but less than ten (10) grams or twenty (20) dosage units, be imprisoned for not less than three (3) years nor more than twenty (20) years or fined not more than Two Hundred Fifty Thousand Dollars ($250,000.00), or both.
>
> (C) Ten (10) grams or twenty (20) dosage units or more, *but less than thirty (30) grams or forty (40) dosage units*, be imprisoned for not less five (5) years nor more than thirty (30) years or fined not more than Five Hundred Thousand Dollars ($500,000.00).

MISS. CODE ANN. § 41-29-139(b)(1) (rev. 2014) (emphasis added).

Methamphetamine is a Schedule II controlled substance pursuant to MISS. CODE ANN. § 41-29-115(A)(c)(3). Thus - borrowing the language of Section 47-7-3(1)(f) - "the amounts [of methamphetamine] specified under Section 41-29-139(b)" now include up to thirty (30) grams or

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[3]MISS. CODE ANN. § 97-3-2 does not include the sale or manufacture of controlled substances as a crime of violence for which parole is unavailable.

forty (40) dosage units. Read together, the plain language of the amended statutes indicates that a person convicted of selling or manufacturing Methamphetamine between June 30, 1995 and July 1, 2014 is eligible for parole, unless he was convicted of selling or manufacturing more than thirty (30) grams or forty (40) dosage units.

Sinko was convicted between June 30, 1995 and July 1, 2014 of manufacturing Methamphetamine in violation of Section 41-29-139(a), but he was **not** convicted of manufacturing more than thirty (30) grams or forty (40) dosage units. Indeed, Sinko was not **convicted** of manufacturing **any** particular quantity of Methamphetamine, and therefore he clearly was not **convicted** of manufacturing an amount exceeding thirty (30) grams or forty (40) dosage units. *Cf. Alleyne v. United States*, 133 S.Ct. 2151, 2155 (2013) ("[A]ny fact that increases the mandatory minimum [sentence that must be served in prison] is an 'element' that must be [found beyond a reasonable doubt]."). Thus, pursuant to the plain language of Sections 47-7-3(1)(f) and 41-29-139(b), Sinko is eligible for parole. *See, e.g., Lawson v. Honeywell Intern., Inc.*, 75 So.3d 1024, 1027 (Miss. 2011) ("If the words of a statute are clear and unambiguous, the Court applies the plain meaning of the statute and refrains from using principles of statutory construction.").

Despite the clear and unambiguous language of Sections 47-7-3(1)(f) and 41-29-139(b) - and the fact that the amendments to the statutes accomplished *exactly what the Task Force recommended* by rendering lower level commercial drug offenders eligible for parole - MDOC will argue that its decision to remove Sinko's parole eligibility date was dictated by this Court's decision in *McGovern v. Mississippi Department of Corrections*, 89 So.3d 69 (Miss. App. 2011). MDOC will further claim that its release of thousands of inmates after this Court's 2011 decision in *McGovern* was simply a clerical error. MDOC will correctly note that *McGovern* held that persons convicted of selling or

manufacturing of any controlled substances, other than marijuana, were not eligible for parole under *then-existing* law.

The fatal error in the MDOC's position is that *McGovern* was decided prior to the 2014 amendments to Sections 47-7-3(1)(f) and 41-29-139(b), and it was the intent of the 2014 amendments to overrule *McGovern*. When *McGovern* was decided, "[n]one of the provisions of section 41-29-139(b) pertain[ed] to selling an amount of a controlled substance other than marijuana." *McGovern*, 89 So.3d at 72. However, the Task Force and the Legislature obviously were dissatisfied with the result in *McGovern*, and the relevant statutes have been amended. Now, as discussed above, the amounts of controlled substances specified under Section 41-29-139(b) include up to thirty (30) grams or forty (40) dosage units of Methamphetamine (or any other Schedule I and II controlled substance). Again, this change renders Sinko - who was not convicted of manufacturing more than thirty (30) grams or forty (40) dosage units of Methamphetamine - eligible for parole.

MDOC may also take the position - as it did in the *McGovern* case - that Sinko "should not be allowed to assert a retroactive analysis of his parole eligibility based on [post-conviction] amendments to section 47-7-3 [and 41-29-139(b)]." *McGovern*, 89 So.3d at 72. However, this Court should reject that argument - just as it did in *McGovern* - because "the MDOC [can] cite no authority that would operate to limit the Legislature's authority to retroactively apply any hypothetical amendments to the parole-eligibility provisions set forth within section 47-7-3." *Id.*

In *McGovern*, this Court found that the MDOC's anti-retroactivity "argument is of no moment" because "there were no amendments to section 47-7-3 by which McGovern would be considered ineligible for parole prior to those amendments and then eligible for parole after

enactment of the amendments." *McGovern*, 89 So.3d at 71. Of course, Sinko's claim for relief is distinguishable from Mr. McGovern's claim because the Legislature now *has* amended Sections 47-7-3(1) and 41-29-139(b) to expand the class of inmates convicted of a violation of Section 41-29-139(a) who may be eligible for parole. As discussed above, that expanded class includes Sinko. *Gilmer v. State*, 955 So.2d 829, 833 (Miss. 2007) (citation ommitted, emphasis added) ("The court may not enlarge *or restrict* a statute where the meaning of the statute is clear.").

While it has already been said once, it must be re-emphasized that in proposing these changes to the Legislature, the Task Force specifically raised concerns about "recent court rulings . . . [that] render[ed] some commercial drug offenders ineligible for technical reasons." Final Report at 16. Of course, this reference is obviously to *McGovern*, which was a "recent court ruling" rendering "some commercial drug offenders ineligible for technical reasons."

ARGUMENT III.

DENYING PRISONERS PAROLE DEPENDENT SOLELY UPON THE DATE OF THEIR CONVICTION AND SENTENCE VIOLATES THE EQUAL PROTECTION CLAUSE OF UNITED STATES CONSTITUTION AMENDMENT FOURTEEN.

If the MDOC's statutory interpretation is correct - and it is not - then inmates convicted of the sale and manufacturing of controlled substances (other than marijuana) are divided into four (4) classes.

First, lucky inmates include those sentenced after the Legislature's 2014 amendments to MISS. CODE ANN. § 47-7-3(1). These inmates who were convicted of selling or manufacturing controlled substances after July 1, 2014 are eligible for parole. MISS. CODE ANN. § 47-7-3(1)(g)(i) incorporates MISS. CODE ANN. § 97-3-2, which provides a list of those ineligible for parole. This

list of ineligible offenders does not include persons convicted of selling or manufacturing controlled substances.

Second, lucky inmates include those convicted of selling or manufacturing controlled substances before June 30, 1995. They also are undisputably eligible for parole. MISS. CODE ANN. § 47-7-3(1).

Third, lucky inmates include those convicted between the dates of June 30, 1995 and July 1, 2014 of selling or manufacturing a controlled substance who were released on parole before the MDOC's arbitrarily selected "cut-off" date.

Fourth, and finally, unlucky inmates, including Sinko, are those convicted of selling or manufacturing a controlled substance between the dates of June 30, 1995 and July 1, 2014, who became parole eligible after the MDOC's arbitrarily selected "cut-off" date. These inmates, according to the interpretation of MDOC, are ineligible for parole.

Whatever reading the courts may give to the relevant statutes, it is irrational to adopt such an interpretation, particularly when the 2014 amendment (House Bill 585) carries out an intent to "[c]ontrol corrections costs by focusing prison space on violent, career criminals. . . ." *Final Report*, p. 6. In the face of rising and horrendous prison costs, recognized by the Task Force and the Legislature, singling out a particular class of persons for parole ineligibility, regardless of their good behavior, and irrespective of the fact that MDOC has previously awarded them parole brings into play the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

The MDOC policy is especially arbitrary because it allows parole eligibility to some inmates convicted between 1995 and 2014, but not to others. Specifically, MDOC did not immediately implement *McGovern v. MDOC,* 89 So.3d 69 (Miss. App. 2011), which denied parole eligibility for

sellers or manufacturers of controlled substances other than marijuana. Rather, three (3) years later, MDOC decided to arbitrarily establish a cut-off date for release after it granted parole to thousands of offenders up to three (3) years after *McGovern* had been decided.[4]

The famous case *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) held that:

> [T]he law itself [may] be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.

Yick Wo, 118 U.S. at 373-374.

This Court has applied the Fourteenth Amendment Equal Protection Clause as late as *Chunn v. State, ex rel. Mississippi Dept. of Insurance*, 156 So.3d 884 (Miss. 2015), when this Court held that a law, which denied a bail bond license to convicted felons to be irrational and to, thus, offend the Equal Protection Clause of the Fourteenth Amendment. *Chunn*, 156 So.3d at 886.

The differing treatment of those convicted of sale or manufacture of controlled substances - rendering them eligible for parole or ineligible - solely depend upon the date of conviction is as irrational as the distinction drawn in *Chunn*.

[4]Since there was no evidentiary hearing, Sinko had no opportunity to put these records before the Court. Sinko will file a separate motion for the Court to take judicial notice of those records.

ARGUMENT IV.

SINKO'S RIGHT TO DUE PROCESS OF LAW UNDER THE MISSISSIPPI AND UNITED STATES CONSTITUTIONS HAS BEEN VIOLATED BY THE MISSISSIPPI DEPARTMENT OF CORRECTIONS' *EX POST FACTO* CHANGE IN POLICY.

It is undisputed that at the time of Sinko's criminal acts in 2011, at the time he entered his guilty plea in 2012, and up until July 2014, MDOC's policy was to grant him parole eligibility. This policy changed when Appellee decided, three (3) years after the fact, to follow an arbitrarily chosen "cut-off" date, after which those convicted of manufacture and selling of controlled substances were no longer parole eligible. United States Constitution § 9, Clause 3 provides that "no . . . ex post facto law shall be passed." United States Constitution, Article 1 § 10, Clause 1 provides that "no state shall . . . pass any . . . ex post facto law."

This Court has sometimes taken a narrow view of the meaning of the "*ex post facto*" clause. See *Taylor v. Mississippi State Probation and Parole Bd.*, 365 So.2d 621 (Miss. 1978) (administrative decisions of parole board with regard to parole eligibility "are not 'laws annexed to the crime when committed,' for purposes of ex post facto clause of Federal and State Constitutions." But see *Mayers v. State*, 42 So.3d 33 (Miss. App. 2010) (laws increasing penalties for use of a firearm during assault on law enforcement officers after the commission of a felony violated *ex post facto* clause); and *Porter v. State*, 749 So.2d 250 (Miss. App. 1999) (increasing penalty for driving under the influence after the act in question violates *ex post facto* clause).

Distinguishing situations in which the Legislature passes an *ex post facto* law, and situations in which MDOC - pursuant to legislative authority – reaches the same result by increasing the punishment due to an *ex post facto* change in policies is not consistent with the basic principles of constitutional law. While the *ex post facto* clause of the United States Constitution undoubtably

applies only to acts of the Legislature, the Supreme Court has recognized "that limitations on *ex post facto* judicial decisionmaking are inherent in the notion of due process." *Rogers v. Tennessee,* 532 U.S. 451, 456 (2001). MDOC's changing the rules of parole eligibility after the crime and after the sentence is as sure a limitation on liberty as if the Legislature had simply passed an *ex post facto* law itself rather than delegating its lawmaking authority to MDOC.

In *Calder v. Bull*, 3 U.S. 386 (1798), the United States Supreme Court specified those type of laws which violate the *ex post facto* clause. The Court classified as "*ex post facto,*" "[e]very law that aggravates a crime, or makes it greater than it was, when committed" and "[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder,* 3 U.S. at 390.

In this case, MDOC's sudden change in policies results in a "greater punishment" than was "annexed to the crime" at the time when it was committed. At the time when committed, MDOC policies provided that Sinko was eligible for parole after serving one-fourth of his sentence. There is a vast difference and a "greater punishment" in a twelve (12) year sentence without parole and a twelve (12) year sentence that may be reduced to three (3) years and parole eligible.

Collins v. Youngblood, 497 U.S. 37 (1990), found a Texas statute under consideration was not an *ex post facto* law, listing as a reason that the statute in question did not "make more burdensome the punishment for a crime, after its commission;. . . ." *Collins*, 497 U.S. at 52. Here, MDOC, through its change in policies, has made more burdensome the "punishment for a crime, after its commission" and, accordingly, violated the *ex post facto* aspect of the Due Process Clause of the Fourteenth Amendment. This same principle was just applied in *Price v. Warden*, 2015 WL 2208422 (5th Cir. 2015). In that case, after the defendant committed the crime of armed robbery,

Louisiana amended its statutes so that an inmate who violated parole conditions would "forfeit all good time earned." The United States Court of Appeals for the Fifth Circuit granted *habeas corpus* relief, finding that the change in law after conviction could result in a loss of "all good time" was contrary to clearly established law as determined by the Supreme Court. *Id.* at *7.

ARGUMENT V.

SINKO'S FOURTEENTH AMENDMENT DUE PROCESS RIGHTS WERE VIOLATED BY THE CIRCUIT COURT'S FAILURE TO WARN HIM THAT A CONSEQUENCE OF HIS PLEA WAS THAT HE WOULD NOT BE ELIGIBLE FOR PAROLE.

There is a huge difference between a sentence of twelve (12) years, all of which is to be served, and a sentence of twelve (12) years, under which one may be paroled after serving one-fourth of that sentence. The sentencing transcript discloses that Sinko was never warned that he was ineligible for parole. Indeed, it would have been improper at that time to warn him that he was ineligible for parole because the policy of MDOC at that time was that he was eligible for parole.

In *Ware v. State of Mississippi*, 379 So.2d 904 (Miss. 1980), by a five (5) to four (4) vote, the Mississippi Supreme Court held that circuit court did not "abuse its discretion" in refusing to allow defendant to withdraw his guilty plea when he was not warned that the offense of armed robbery was without parole. This Court there pointed out that the defendant had been granted a "full hearing" and a "careful search of the record fails to reveal an actual reliance on any hope of parole while deliberating on whether to enter his guilty plea." *Ware*, 379 So.2d at 905. Of course, in the present case, Sinko was denied a hearing and had no opportunity to demonstrate to the circuit court his reliance on the practice of granting parole at the time he entered his guilty plea.

Most notably, even in the situation where a full hearing was held, four (4) Justices of the Mississippi Supreme Court dissented in a persuasive discussion that should now be followed by this

Court. The four (4) judges in dissent – even where a full hearing had been granted and reliance had not been shown – thought that being warned of the non-eligibility for parole was a consequence of the plea, stating:

> In *Trujillo v. United States, supra*,[5] the 5th Circuit held that ineligibility for parole is not a consequence of a guilty plea about which a defendant must be informed. This is the minority view among the Federal Circuits, the soundness of this decision having been questioned by the 5th Circuit itself.
>
> Eight of the Federal Circuit Courts directly addressing this issue have disagreed with the *Trujillo* decision, holding that ineligibility for parole is a consequence about which a defendant must be informed for him to voluntarily and knowingly plead guilty. *Otero-Rivera v. United States*, 494 F.2d 900 (1st Cir. 1974); *Bye v. United States*, 435 F.2d 177 (2nd Cir. 1970); *Berry v. United States*, 412 F.2d 189 (3rd Cir. 1969); *Harris v. United States*, 426 F.2d 99 (6th Cir. 1970); *Gates v. United States*, 515 F.2d 73 (7th Cir. 1975); *Moody v. United States*, 469 F.2d 705 (8th Cir. 1972); *Munich v. United States*, 337 F.2d 356 (9th Cir. 1964); *Jenkins v. United States*, 420 F.2d 433 (10th Cir. 1970). Only the Fifth Circuit and the D.C. Circuit in the first case to address this issue have held that ineligibility for parole is not a consequence of a guilty plea. *Smith v. United States*, 116 U.S.App.D.C. 404, 324 F.2d 436 (D.C. Cir. 1963).

Ware, 379 So.2d at 910-11.

Since even the 5-4 majority in *Ware* relied upon the fact that a hearing had been held and defendant had failed to make a demonstration that he relied on a belief of parole eligibility, this Court should hold that Sinko is at least entitled to a hearing where he can demonstrate that he relied on the MDOC's then-policy of being eligible for parole.

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[5] *Trujillo v. United States*, 377 F.2d 266 (5th Cir. 1967), cert. den. 389 U.S. 899 (1967).

CONCLUSION

This Court should enter an order directing the Parole Board to follow its order of July 8, 2014, granting Mr. Sinko parole.

RESPECTFULLY SUBMITTED, this the 2nd day of June, 2015.

NATHAN SINKO, Appellant

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing pleading or other paper with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

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